



# ICLG

The International Comparative Legal Guide to:

## **Project Finance 2013**

**2nd Edition**

A practical cross-border insight into project finance

Published by Global Legal Group, with contributions from:

Advokatfirmaet Thommessen AS

Ali Budiardjo, Nugroho, Reksodiputro

Amarchand & Mangaldas & Suresh A. Shroff & Co.

Boga & Associates

Bonelli Erede Pappalardo

Brigard & Urrutia Abogados S.A.

Clayton Utz

Colibri Law Firm

Cuatrecasas, Gonçalves Pereira

Debarliev, Dameski & Kelesoska Attorneys at Law

Dr. Adam & Associates

EPLegal Limited

Fellner Wratzfeld & Partners

Gonzalez Calvillo, S.C.

Gorrissen Federspiel

Gowling Lafleur Henderson LLP

Hajji & Associés

Heuking Kühn Lüer Wojtek

Ikeyi & Arifayan

Koep & Partners

Lee and Li, Attorneys-at-Law

Loyens & Loeff

Mattos Filho, Veiga Filho, Marrey Jr. e Quiroga Advogados

Milbank, Tweed, Hadley & McCloy LLP

Odvetniki Šelih & partnerji, o.p., d.o.o.

Pachiu & Associates

Philippi, Yrarrazaval, Pulido & Brunner

Project Lawyers

Schweizer Legal, s. r. o.

SJ Berwin LLP

Torres Plaz & Araujo

Vinson & Elkins RLLP

Walder Wyss Ltd.

White & Case LLP

Yigal Arnon & Co.

# GLG

Global Legal Group

#### Contributing Editor

John Dewar, Milbank,  
Tweed, Hadley & McCloy  
LLP

#### Account Managers

Beth Bassett, Brigitte  
Descacq, Dror Levy, Maria  
Lopez, Florjan Osmani,  
Oliver Smith, Rory Smith

#### Sales Support Manager

Toni Wyatt

#### Sub Editors

Beariz Arroyo  
Fiona Canning

#### Editor

Suzie Kidd

#### Senior Editor

Penny Smale

#### Group Consulting Editor

Alan Falach

#### Group Publisher

Richard Firth

#### Published by

Global Legal Group Ltd.  
59 Tanner Street  
London SE1 3PL, UK  
Tel: +44 20 7367 0720  
Fax: +44 20 7407 5255  
Email: info@glgroup.co.uk  
URL: www.glgroup.co.uk

#### GLG Cover Design

F&F Studio Design

#### GLG Cover Image Source

iStockphoto

#### Printed by

Ashford Colour Press Ltd.  
April 2013

Copyright © 2013  
Global Legal Group Ltd.  
All rights reserved  
No photocopying

ISBN 978-1-908070-56-2

ISSN 2048-688X

#### Strategic Partners



### General Chapters:

1	<b>Why the World Needs Multi-Sourced Project Financings (and Project Finance Lawyers...)</b> – John Dewar & Oliver Irwin, Milbank, Tweed, Hadley & McCloy LLP	1
2	<b>Reserve Based Lending – Structural Considerations and Challenges</b> – Rinku Bhadoria & Neil Upton, SJ Berwin LLP	7
3	<b>Sunshine and Shifting Sands – Recent Trends and Future Outlook in Oil and Gas Project Financing</b> – Tom Bartlett & Dina Elshurafa, White & Case LLP	12
4	<b>Financing Refinery and Petrochemical Projects: Opportunities and Challenges</b> – Nabil L. Khodadad & Andrew Nealon, Vinson & Elkins RLLP	17
5	<b>CEMAC Countries: Where Harmonised Regulations Shared by Six Central African Countries Facilitate Project Financings in Emerging Countries</b> – Jean-Pierre Bozec, Project Lawyers	22

### Country Question and Answer Chapters:

6	<b>Albania</b>	Boga & Associates: Renata Leka & Besa Velaj (Tauzi)	25
7	<b>Australia</b>	Clayton Utz: Bruce Cooper	33
8	<b>Austria</b>	Fellner Wratzfeld & Partners: Markus Fellner	42
9	<b>Belgium</b>	Loyens & Loeff: Marc Vermeylen & Christophe Laurent	51
10	<b>Brazil</b>	Mattos Filho, Veiga Filho, Marrey Jr. e Quiroga Advogados: Pablo Sorj & Thiago Moreira	61
11	<b>Canada</b>	Gowling Lafleur Henderson LLP: Alison Babbitt & David B. Kierans	69
12	<b>Chile</b>	Philippi, Yrarrazaval, Pulido & Brunner: Marcelo Armas M.	77
13	<b>Colombia</b>	Brigard & Urrutia Abogados S.A.: Manuel Fernando Quinche González & César Rodríguez Parra	83
14	<b>Denmark</b>	Gorissen Federspiel: Morten Lundqvist Jakobsen & Tina Herbing	90
15	<b>England &amp; Wales</b>	SJ Berwin LLP: Rinku Bhadoria & Neil Upton	98
16	<b>Georgia</b>	Colibri Law Firm: Nino Begalishvili & David Kakabadze	109
17	<b>Germany</b>	Heuking Kühn Lüer Wojtek: Adi Seffer	121
18	<b>India</b>	Amarchand & Mangaldas & Suresh A. Shroff & Co.: Jatin Aneja	129
19	<b>Indonesia</b>	Ali Budiardjo, Nugroho, Reksodiputro: Freddy Karyadi & Emir Nurmansyah	139
20	<b>Israel</b>	Yigal Aron & Co.: David Schapiro & Peter Sugarman	150
21	<b>Italy</b>	Bonelli Erede Pappalardo: Catia Tomasetti & Simone Ambroggi	161
22	<b>Kazakhstan</b>	Colibri Law Firm: Saniya Perzadayeva & Raushana Chaltabayeva	169
23	<b>Kosovo</b>	Boga & Associates: Sokol Elmazaj & Sabina Lalaj	179
24	<b>Kyrgyzstan</b>	Colibri Law Firm: Zhanyl Abdrakhmanova & Denis Bagrov	186
25	<b>Luxembourg</b>	Loyens & Loeff: Vassiliyan Zanev & Xavier Guzman	194
26	<b>Macedonia</b>	Debarliev, Dameski & Kelesoska Attorneys at Law: Dragan Dameski & Jasmina Ilieva Jovanovikj	203
27	<b>Mexico</b>	Gonzalez Calvillo, S.C.: Jorge Cervantes & Rodrigo Rojas	210
28	<b>Morocco</b>	Hajji & Associés: Amin Hajji	220
29	<b>Namibia</b>	Koep & Partners: Peter Frank Koep & Hugo Meyer van den Berg	226
30	<b>Netherlands</b>	Loyens & Loeff: Elisabetta Aarts & Gianluca Kreuze	233
31	<b>Nigeria</b>	Ikeyi & Arifayan: Sola Arifayan & Kenechi Ezezika	243
32	<b>Norway</b>	Advokatfirmaet Thommessen AS: Berit Stokke & Cathinka Kahrs Rognsvåg	251
33	<b>Romania</b>	Pachiu & Associates: Alexandru Lefter & Laurentiu Pachiu	259
34	<b>Slovakia</b>	Schweizer Legal, s. r. o.: Lucie Schweizer & Alexandra Horváthová	268
35	<b>Slovenia</b>	Odvetniki Šelih & partnerji, o.p., d.o.o.: Mia Kalaš & Blaž Ogorevc	275
36	<b>Spain</b>	Cuatrecasas, Gonçalves Pereira: Héctor Bros & Jaime Ribó	284

Continued Overleaf →

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

#### Disclaimer

This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice. Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication. This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

## Country Question and Answer Chapters:

37	<b>Sudan</b>	Dr. Adam & Associates: Dr. Mohamed Ibrahim Adam	294
38	<b>Switzerland</b>	Walder Wyss Ltd.: Thomas Müller-Tschumi & Alexandre Both	306
39	<b>Taiwan</b>	Lee and Li, Attorneys-at-Law: Joyce C. Fan & Yi-Jiun Su	315
40	<b>USA</b>	Milbank, Tweed, Hadley & McCloy LLP: Eric F. Silverman & Vanessa Pronovost	322
41	<b>Uzbekistan</b>	Colibri Law Firm: Sofia Shakhrazieva & Umid Aripdjanov	330
42	<b>Venezuela</b>	Torres Plaz & Araujo: Federico Araujo & Juan Carlos Garantón	342
43	<b>Vietnam</b>	EPLegal Limited: Nguyen Trung Nam (Tony) & Dang Thi Thu Quyen	349

---

## EDITORIAL

---

Welcome to the second edition of *The International Comparative Legal Guide to: Project Finance*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of project finance.

It is divided into two main sections:

Five general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting project finance, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in project finance laws and regulations in 38 jurisdictions.

All chapters are written by leading project finance lawyers and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor John Dewar of Milbank, Tweed, Hadley & McCloy LLP, for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at [www.iclg.co.uk](http://www.iclg.co.uk).

Alan Falach LL.M  
Group Consulting Editor  
Global Legal Group  
[Alan.Falach@glgroup.co.uk](mailto:Alan.Falach@glgroup.co.uk)

---

# Taiwan



Joyce C. Fan



Yi-Jiun Su

Lee and Li, Attorneys-at-Law

## 1 Overview

### 1.1 What are the main trends/significant developments in the project finance market in Taiwan?

In Taiwan, project finance primarily applies to infrastructure projects developed by the private sector or through a public-private partnership. The major legislation that governs private participation in infrastructure projects is the “Act for Promotion of Private Participation in Infrastructure Projects” (the “PPP Act”), last amended in 2001. The PPP Act provides 13 categories of public works for private sector’s participation, including, among others, transportation facilities and common conduit, sewerage treatment facilities, water supply and flood control and drainage facilities, recreation/tourism facilities, and power supply facilities.

A project company under the PPP Act may apply for mid- and long-term loans from domestic banks at preferential interest rates; also, foreign banks may participate in the syndication of loans. Furthermore, there are other deregulations regarding the issuing of new shares and corporate bonds to facilitate the project company’s financing.

### 1.2 What are the most significant project financings that have taken place in Taiwan in recent years?

The most significant project financing transaction in Taiwan in recent years is the Taiwan High Speed Rail project (a NT\$323.3 billion (US\$10.5 billion) multi-tranche syndicated loan) in 2000. Project financing was also adopted for other large-scale projects, such as the renowned Taipei 101 Tower (which opened in 2004), a number of independent power plants (the latest one commenced commercial operations in 2009), and the Taiwan Taoyuan International Airport Access MRT System (construction commenced in 2006).

## 2 Security

### 2.1 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

It is possible to create asset security by means of a general security agreement. While a separate agreement for each type of assets is not necessary, different legal requirements apply to different types of assets, as elaborated in question 2.2 below. Although there have

been some foreign companies which have successfully foreclosed a pledge over shares issued by Taiwanese companies without being challenged of the capability issue, most of the rulings issued by the government authorities have confirmed that a foreign company not recognised by the Taiwanese government has no legal capacity to acquire any security interest in assets located in Taiwan.

### 2.2 Can security be taken over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground)? Briefly, what is the procedure?

A mortgage over real property, including land and buildings, has to be registered with the land office to take effect. A chattel pledge takes effect when the chattel is in the pledgee’s possession. A mortgage over a chattel such as machinery, equipment, tools or raw materials cannot be created without a signed agreement between the pledgor and the pledgee and cannot be enforced against any *bona fide* third party if it is not registered with the competent authorities. For projects subject to the PPP Act, approval of the competent government authorities may be required before project assets are encumbered for the purpose of project finance.

### 2.3 Can security be taken over receivables where the chargor is free to collect in the receivables in the absence of a default and the debtors are not notified of the security? Briefly, what is the procedure?

To create a pledge over receivables, the pledgor and the pledgee must sign a pledge agreement, and with the pledgee’s consent, the pledgor (or charger) is free to collect the receivables in the absence of a default. The pledge is not enforceable against the debtor owing the receivables until the debtor is notified of the pledge. The pledgor should provide the pledgee with documentary evidence of the receivables. Usually, the pledgor and the pledgee will, in the pledge agreement, require the debtor to remit the outstanding receivables to a bank account designated by the pledgee in the event that the debtor is informed of the pledgor’s default.

### 2.4 Can security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

A pledge may be created over cash deposits in bank accounts following the same procedure described in question 2.3 above. The pledgor is required to provide the pledgee with proof of the cash deposits such as the passbook. In local practice, the bank’s prior consent is usually required pursuant to the agreement for a deposit

account between the pledgor and the bank for the creation of a pledge over cash deposits. Most banks would consent to a pledge over a negotiable certificate of deposit, but not current account deposits.

### 2.5 Can security be taken over shares in companies incorporated in Taiwan? Are the shares in certificated form? Briefly, what is the procedure?

A pledge may also be created over shares in a Taiwanese company. Shares of listed companies are traded through making book entries, while those of private companies are traded through transferring share certificates. To create a pledge over shares in a Taiwanese private company limited by shares, the pledgor and the pledgee must sign an agreement. By and large, a pledge is validly created when the certificates of the pledged shares are handed over to the pledgee, and the certificates have been duly endorsed. However, the pledge cannot be enforced against the company (whose shares are pledged) unless the company has been notified of such pledge.

To create a pledge over listed shares which are traded through the book-entry system of Taiwan Depository and Clearing Corporation (“TDCC”), the above endorsement, delivery and notification requirements do not apply. Instead, the entry of the pledge through TDCC’s book-entry system in accordance with TDCC’s regulations will suffice.

### 2.6 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets (in particular, shares, real estate, receivables and chattels)?

Notarisation and stamp duties do not apply to the provision of any assets as security. Whether registration is required depends on the type of assets provided as security. Generally speaking, provision of shares or receivables as security need not be registered with any government authorities.

The registration fees for chattel and real property mortgages are as follows:

- Chattels: NT\$900 per case; and
- Real Property: 0.1% of the secured amount.

### 2.7 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

In general, notification and registration (if required) can be done within a few days.

### 2.8 Are any regulatory or similar consents required with respect to the creation of security over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground) etc.?

Regulatory consents are generally not required for the creation of security over real property, plant, machinery or equipment owned by an individual or a private entity, unless the individual or private entity has made any contractual commitment with the government agencies. In Taiwan, facilities of public utilities such as pipelines are usually owned by the state or state-owned enterprises, and thus the chances of them being provided as security are remote.

A project company under the PPP Act may not, without the consent of the competent government authorities, transfer, lease or create

any encumbrance on the operating assets or machinery or its rights under the investment agreement with the government agency (the “Concession Right”), or have the Concession Right subject to compulsory enforcement. Any such transfer, lease, creation of any encumbrance or compulsory enforcement without said consent would be rendered null and void.

## 3 Security Trustee

### 3.1 Regardless of whether Taiwan recognises the concept of a “trust”, will it recognise the role of a security trustee or agent and allow the security trustee or agent (rather than each lender acting separately) to enforce the security and to apply the proceeds from the security to the claims of all the lenders?

Taiwan recognises the role of a security trustee or agent only if the security trustee or agent is one of the lenders. In addition, if it is so authorised under an agreement between or among the lenders, a security trustee or agent is allowed to enforce the security and to apply the proceeds from the sale of the security to satisfy the debts to all the lenders.

### 3.2 If a security trust is not recognised in Taiwan, is an alternative mechanism available (such as a parallel debt or joint and several creditor status) to achieve the effect referred to above which would allow one party (either the security trustee or the facility agent) to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

Not applicable. As explained in question 3.1 above, a security trust is recognised in Taiwan as long as the security trustee or agent is one of the lenders.

## 4 Enforcement of Security

### 4.1 Are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or the availability of court blocking procedures to other creditors/the company (or its trustee in bankruptcy/liquidator), or (b) (in respect of regulated assets) regulatory consents?

A secured creditor may exercise its rights over the security through compulsory enforcement despite the ongoing bankruptcy proceeding or liquidation. The standard steps for initiating compulsory enforcement are: (1) filing a petition with the court for a writ of execution; (2) court officials seizing the security; and (3) the court holding an auction for the sale of the security and distributing the proceeds to the secured creditor. Unless other creditors have priority over the underlying security, the proceeds should be paid to the secured creditor first.

The foreclosure on operating assets or machinery or the Concession Right of a project company under the PPP Act is subject to the competent government authorities’ consent. See question 2.8 above.

### 4.2 Do restrictions apply to foreign investors or creditors in the event of foreclosure on the project and related companies?

The restrictions explained in question 4.1 above also apply to

foreign investors and creditors in the event of foreclosure on the project company's operating assets or machinery or Concession Right.

## 5 Bankruptcy Proceedings

### 5.1 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the security?

If the project company enters a bankruptcy proceeding, the security owned by the project company will become a part of the bankruptcy estate. A secured project lender has a preferential right to claim proceeds from the sale of the underlying security through the bankruptcy proceeding while it still retains the right to initiate a compulsory enforcement action during the bankruptcy proceeding. In addition, if the sale proceeds (from court auction through compulsory enforcement proceedings) are insufficient to repay the claims in full, it may participate in the bankruptcy proceeding to get additional distribution *pari passu* with the unsecured creditors.

### 5.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

There are no preference periods with respect to the security. The bankruptcy administrator may, within six months of the bankruptcy adjudication, apply to the court for the invalidation of the following acts of the debtor: (1) provision of security for outstanding debts within six months prior to the bankruptcy adjudication; and (2) repayment of debts not yet due. In addition, costs of compulsory enforcement against the security and taxes, such as land value increment tax, land value tax and house tax, have priority over the claims of secured lenders.

### 5.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

The following may apply for bankruptcy adjudication: (1) natural persons; (2) juristic persons; and (3) partnerships and any other unincorporated association with a representative or an administrator. An unincorporated association without a representative or administrator is excluded from a bankruptcy proceeding, and there is no special legislation applicable to such entity.

### 5.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of the project company in an enforcement?

A creditor and the project company may sign an agreement whereby the ownership of the mortgaged or pledged security will be transferred to the mortgagee or pledgee automatically when the project company defaults; however, in the case of a mortgaged security, such agreement to transfer cannot be enforced against a *bona fide* third party, unless the mortgage is registered with the competent authorities.

## 6 Foreign Investment and Ownership Restrictions

### 6.1 Are there any restrictions, controls, fees and/or taxes on foreign ownership of a project company?

For national security or public policy reasons, Taiwan maintains a

list of industries in which foreign investment is prohibited or restricted. All foreign investments, regardless of the industry, are subject to the approval of the Investment Commission under the Ministry of Economic Affairs (the "IC") except for foreign portfolio investment in publicly traded securities. In addition, additional rules apply to investments from the People's Republic of China (the "PRC").

Regulations governing foreign direct investment, excluding investments from the PRC, are mainly provided under the Statute for Investment by Foreign Nationals (the "SIFN") and the Statute for Investment by Overseas Chinese. Both statutes specify that foreign-invested companies must receive the same regulatory treatment accorded to local companies.

### 6.2 Are there any bilateral investment treaties (or other international treaties) that would provide protection from such restrictions?

None of the bilateral or multinational investment treaties signed by Taiwan provides any exemption from the restrictions stated in question 6.1 above.

### 6.3 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?

Generally speaking, the Taiwanese government may expropriate land in accordance with the Land Expropriation Act, under which the owners of the expropriated land are entitled to reasonable compensation. Pursuant to the SIFN, the government may expropriate or acquire an invested company for national security and defence reasons by paying a reasonable compensation, provided that the total foreign investment in such invested company is less than 45% of the total capital amount of the invested company. If the total foreign investment in an invested company has never accounted for less than 45% of its total capital amount, the invested company will be immune from expropriation for 20 years from its establishment.

## 7 Government Approvals/Restrictions

### 7.1 What are the relevant government agencies or departments with authority over projects in the typical project sectors?

Various central and local government authorities are authorised to implement projects under the PPP Act. The Department of Promotion of Private Participation under the Ministry of Finance is responsible for administering the PPA Act and overseeing projects in the typical project sectors.

### 7.2 Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?

In general, Taiwanese laws do not require that a specific financing or project document be registered or filed with government authorities for validity. Nor do the laws require that such documents be in conformity with specific legal formalities.

**7.3 Does ownership of land, natural resources or a pipeline, or undertaking the business of ownership or operation of such assets, require a licence (and if so, can such a licence be held by a foreign entity)?**

Foreign entities may not own forest land, land with mineral deposits, water sources or other pieces of land with similar resources. Other than the above, a foreign entity with a branch in Taiwan may acquire pieces of land in Taiwan, provided that its home country grants reciprocity to Taiwanese nationals and entities.

The extraction of natural resources requires a licence under the Mining Act and the operation of pipelines (for water, electricity, gas, and so on) also requires a licence under the Act on Regulating Private Utilities. A project company incorporated in Taiwan and awarded the Concession Right pursuant to the PPP Act should generally be eligible for such licence.

**7.4 Are there any royalties, restrictions, fees and/or taxes payable on the extraction or export of natural resources?**

Under the Mining Act, only Taiwanese nationals, whether natural or juridical persons, can own mineral rights to extract natural resources. A mineral rights holder needs to pay the government mineral royalties and mineral rights fees twice a year. Mineral royalties are calculated at 2% to 50% of the price for petroleum and natural gas, 2% to 20% for metallic minerals, and 2% to 10% for other minerals, while the amount of mineral rights fees depends on the kind of minerals and the terms of the concession. Tariffs may be imposed on the export of natural gas and petroleum, but there is no tariff for exporting petroleum to a WTO member.

**7.5 Are there any restrictions, controls, fees and/or taxes on foreign currency exchange?**

There are several foreign exchange restrictions and controls, depending on the amount involved. Generally speaking, a local company has an annual foreign exchange quota of US\$50 million, and may therefore remit sums of foreign currency within the quota into or out of Taiwan without prior approval from the Central Bank of Taiwan. No government fee or tax is payable purely on foreign currency exchange transactions.

**7.6 Are there any restrictions, controls, fees and/or taxes on the remittance and repatriation of investment returns or loan payments to parties in other jurisdictions?**

Any remittance and repatriation of funds to a party in another jurisdiction will be subject to foreign exchange control in Taiwan if it involves exchange settlements against New Taiwan dollars. For example, a company should declare to the remitting bank any foreign exchange transaction involving an amount over US\$1 million. As to tax treatments, the remittance of dividends is subject to withholding tax at 20% or lower if there is a tax treaty between Taiwan and that jurisdiction, while the remittance of loan repayments is not taxable except for interest, which is subject to a 20% withholding tax or a lower treaty rate.

**7.7 Can project companies establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions?**

A project company may open and maintain a foreign currency account as long as it provides all the documents required by the

bank for opening an account. Taiwanese law does not prohibit it from opening an offshore account in another jurisdiction.

**7.8 Is there any restriction (under corporate law, exchange control, other law or binding governmental practice or binding contract) on the payment of dividends from a project company to its parent company where the parent is incorporated in Taiwan or abroad?**

Under the Company Act, a company should not pay dividends unless and until its losses have been covered, a legal reserve has been set aside, and there are surplus earnings left. If a company pays dividends in violation of the above provisions, creditors of the company may request nullification of the dividend distribution and demand compensation for losses incurred, and the statutory representative of the company will be sentenced to up to one year's imprisonment. If the dividends are paid to a foreign parent company, they will be subject to withholding tax as explained in question 7.6 above.

**7.9 Are there any material environmental, health and safety laws or regulations that would impact upon a project financing and which governmental authorities administer those laws or regulations?**

Taiwan has various environmental, health and safety laws and related administrative regulations. The impact that they may have on a project financing depends on the nature and the contractual terms of the project. If a project involves substantial environmental issues or may create hazardous worksites or substances with a risk of significant liabilities (e.g., soil and groundwater pollution and clean up), the lenders may be cautious about providing project finance or may demand the inclusion of repayment acceleration clauses in the loan agreement. The Environmental Protection Administration under the Executive Yuan is currently the highest governmental authority supervising all environment-related matters, and the local Environmental Protection Bureau would oversee projects located within its jurisdiction.

**7.10 Is there any specific legal/statutory framework for procurement by project companies?**

As long as over 50% of the project company is owned by the private sector and not characterised as a state-owned enterprise, its procurement should not be subject to any special legal/statutory framework such as the Government Procurement Act. If a project company enters into an investment contract with the competent government authorities under the PPP Act, its procurement may be subject to the special requirements under the investment contract.

## 8 Foreign Insurance

**8.1 Are there any restrictions, controls, fees and/or taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies?**

Foreign insurance companies may not sell insurance policies in Taiwan unless they obtain a licence to do so from the Financial Supervisory Commission (the "FSC"). In addition, insurance companies must submit the terms and conditions of their insurance policies to the FSC for approval before selling them in the market. Once licensed and approved, they will not be subject to any special restrictions or controls on their sale of insurance policies over

project assets. If the insurance premium on the project assets is paid by a Taiwanese company or the Taiwan branch of a foreign company, such Taiwanese entity may have to bear the tax withholding obligation.

## 8.2 Are insurance policies over project assets payable to foreign (secured) creditors?

A foreign company may be named as a payee or receive an insurance payment through a pledge of the insurance policy in Taiwan only after it has been recognised and set up a branch in Taiwan in accordance with the Company Act.

## 9 Foreign Employee Restrictions

### 9.1 Are there any restrictions on foreign workers, technicians, engineers or executives being employed by a project company?

Hiring of foreign workers is subject to certain restrictions under the Employment Services Act. A permit from the competent labour authorities is required to hire technicians, engineers or executives. Application procedures and government administrative measures are provided under the Employment Services Act and the regulations promulgated by the Council of Labour Affairs.

## 10 Equipment Import Restrictions

### 10.1 Are there any restrictions, controls, fees and/or taxes on importing project equipment or equipment used by construction contractors?

Certain equipment and components used by construction contractors such as cranes, cables, and wires are subject to inspection during import clearance procedures for public safety reasons. The government authorities in charge of inspecting such imports and labour safety are the Bureau of Standards, Metrology and Inspection (<http://www.bsmi.gov.tw/wSite/index.jsp>) and the Council of Labour Affairs (<http://www.cla.gov.tw>). In general, importation of goods for sale or other commercial use is subject to import duties and 5% sales tax; the importation of certain commodities such as tyres, vehicles, gasoline, and machineries is subject to commodity tax. The PPP Act provides: (i) an import duty exemption for certain qualified equipment used by construction contractors; and (ii) a deferred (until one year after commercial operations) installment payment of import duty on operating equipment to be used by a project company.

### 10.2 If so, what import duties are payable and are exceptions available?

Products are classified in accordance with the Customs' CCC Codes with corresponding import duty rates. The CCC Codes are published on the website of the Directorate General of Customs (<http://www.customs.gov.tw/Rateweb/search1.aspx>). To encourage development of certain industries, the importation of some equipment and key parts required by such industries may enjoy zero import duty. Exemptions from import duties are generally provided under Article 49 of the Customs Act. See also the import duty exemption explained in question 10.1 above.

## 11 Force Majeure

### 11.1 Are force majeure exclusions available and enforceable?

*Force majeure* exclusions are common in project contracts. Taiwanese law generally respects party autonomy, hence a *force majeure* clause is usually enforceable. Under the Taiwan Civil Code, an obligor is generally not held liable for non-performance if the non-performance is through no fault of the obligor.

## 12 Corrupt Practices

### 12.1 Are there any rules prohibiting corrupt business practices and bribery (particularly any rules targeting the projects sector)? What are the applicable civil or criminal penalties?

Bribing a public official in exchange for certain favours constitutes a criminal offence in Taiwan. According to the Statute of Punishment for Corruption, a person may be sentenced to one to seven years' imprisonment and fined up to NT\$3 million if he offers a bribe or other unjust enrichment to a government official in return for his breach of duty; or up to three years' imprisonment and/or a NT\$500,000 fine for bribing a government official in return for a favour which does not entail a breach of the government official's duty.

In a government procurement project, if the bidder (or supplier or contractor) gives public officials a commission, kickbacks, a brokerage fee, or any other unjust benefits to win a procurement contract, the bid bond may be confiscated, and the contract may be terminated or rescinded. Furthermore, the bidder may be barred from bidding for government procurement projects for one year.

## 13 Applicable Law

### 13.1 What law typically governs project agreements?

In Taiwan, parties to a contract are generally free to choose the governing law of the contract. In practice, it is common for the parties to choose Taiwanese law as the governing law for projects in Taiwan; in particular, the government counterpart to an investment agreement under the PPP Act is not likely to accept a foreign law as the governing law. However, for EPC contracts involving international contractors, we have seen contracts governed by New York law or English law.

### 13.2 What law typically governs financing agreements?

Most infrastructure projects in Taiwan are locally financed. Thus, Taiwanese law typically governs financing agreements.

### 13.3 What matters are typically governed by domestic law?

Investment agreements, off-take agreements, financing agreements, project insurance policies and land acquisition agreements are typically governed by domestic law.

## 14 Jurisdiction and Waiver of Immunity

### 14.1 Is a party's submission to a foreign jurisdiction and waiver of immunity legally binding and enforceable?

Under Taiwanese law, parties may agree to submit their disputes to a foreign court or an arbitral tribunal located outside of Taiwan, even if one of the parties is a government agency. Taiwanese courts generally honour such an agreement on the basis of party autonomy. The principle of sovereign immunity does not apply to projects in Taiwan.

## 15 International Arbitration

### 15.1 Are contractual provisions requiring submission of disputes to international arbitration and arbitral awards recognised by local courts?

Taiwanese courts recognise arbitration agreements requiring submission of disputes to arbitration institutions or *ad hoc* arbitration outside of Taiwan. The arbitral awards rendered under such arbitration agreements are generally recognised and enforceable unless any of the grounds for denial of recognition or enforcement prescribed under the Arbitration Act applies.

### 15.2 Is Taiwan a contracting state to the New York Convention or other prominent dispute resolution conventions?

Taiwan is not a party to the New York Convention. However, provisions similar to Article 5 of the New York Convention are provided under the Arbitration Act. For example, Taiwanese courts may dismiss a petition for the recognition and enforcement of a foreign arbitral award on certain grounds, including that the recognition or enforcement of the arbitral award is contrary to the public order or good morals of Taiwan, or the dispute is not arbitrable under Taiwanese law.

### 15.3 Are any types of disputes not arbitrable under local law?

Under the Arbitration Act, disputes that can be resolved through arbitration are limited to “those which may be settled in accordance with the law”. A good example of matters that may not be settled or arbitrated is a dispute over the validity of intellectual property rights because it can only be decided by the Intellectual Property Office or the Intellectual Property Court.

### 15.4 Are any types of disputes subject to mandatory domestic arbitration proceedings?

Some types of disputes are subject to mandatory arbitration under Taiwanese law, e.g., a dispute between the Stock Exchange Corporation and a securities firm, no matter whether there is an arbitration agreement between them. In addition, in a dispute over a government procurement contract, if the government agency refuses to accept mediation suggestions or resolutions proposed by the Public Construction Commission under the Executive Yuan, and the contractor files for arbitration, the dispute must be resolved by arbitration.

## 16 Change of Law / Political Risk

### 16.1 Has there been any call for political risk protections such as direct agreements with central government or political risk guarantees?

Political risk protections such as direct agreements with the central government or political risk guarantees are rare in Taiwan because the legal framework and political regime are relatively stable, and the government generally does not feel the need to offer such protections. In some exceptional cases, the government has agreed to buy back the project assets to facilitate project finance.

## 17 Tax

### 17.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Interest paid to foreign lenders is subject to withholding tax as explained in question 7.6 above. However, exemption may be available for interest derived from: (1) loans given by a foreign government or financial institutions for economic development; (2) financing facilities offered to its own branch or other Taiwanese financial institutions by a foreign financial institution; (3) loans extended for important economic construction projects approved by the Ministry of Finance; or (4) favourable-interest export loans or guarantees from foreign governmental institutions or foreign financial institutions specialising in export loans.

Proceeds from exercising a claim under a guarantee or proceeds from enforcing security will not be subject to withholding tax.

### 17.2 What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

While tax incentives were offered to foreign investors in the past, the current tax regime generally does not treat foreign and local investors and creditors differently, except that no withholding tax applies to the profits repatriated to a foreign company by its branch office in Taiwan and that certain interest income of a foreign company is exempt from withholding tax, as explained in question 17.1 above.

A foreign investor subscribing for shares issued by a qualified project company under the PPP Act may enjoy tax credits of up to 20% of its investment amount. Such tax credits, which are also offered to domestic investors, may be applied against the withholding tax on the dividends expatriated by a project company to its foreign shareholders.

Under Taiwanese law, no tax is required to be paid in order for foreign investments, loans, mortgages or other security documents to take effect or to be successfully registered.

## 18 Other Matters

## 18.1 Are there any other material considerations which should be taken into account by either equity investors or lenders when participating in project financings in Taiwan?

The risk allocation under many project agreements with a government counterpart may not necessarily be in line with the international practice and may be more protective of the government party. Thus, risk control or mitigation measures would be especially important.

Legal entities in which the PRC investors hold 30% or more shares in total or which are controlled directly or indirectly by the PRC natural or juristic persons are considered the PRC investors. Their investments in Taiwan are limited to certain businesses and are subject to special approval from the IC. However, as the Economic Cooperation Framework Agreement between Taiwan and the PRC took effect in 2010, the Taiwanese government's current policy is to encourage the PRC investment in several major infrastructure projects such as civil airport, harbour, tourist resort and their ancillary facilities.



Joyce C. Fan

Lee and Li, Attorneys-at-Law  
7th Floor, 201, Tun Hua North Road  
Taipei  
Taiwan, R.O.C.

Tel: +886 2 2715 3300 ext. 2280  
Fax: +886 2 2713 3966  
Email: joycef@leeandli.com  
URL: www.leeandli.com

A partner of Lee and Li, Attorneys-at-Law, Joyce is qualified to practice law in Taiwan and New York. Her practice areas include corporate, cross-border transactions, M&A, infrastructure projects, government procurement, trade law, energy law, environmental protection law, and related dispute resolution. Joyce is experienced in drafting, reviewing and negotiating various types of commercial contracts. She has extensive experience in handling various commercial transactions, with a special focus on infrastructure projects. Joyce also advises clients on disputes arising from such transactions, and coordinates with prominent law firms worldwide to assist clients across different jurisdictions. She served as an advisor to the Executive Yuan (Cabinet) Committee for Promotion of Private Participation in Infrastructure Projects during 2003-2004.

## 18.2 Are there any legal impositions to project companies issuing bonds or similar capital market instruments? Please briefly describe the local legal and regulatory requirements for the issuance of capital market instruments.

The issuance of corporate bonds by a project company in Taiwan is subject to the regulatory requirements and restrictions under the Company Act and the Securities and Exchange Act, including the financial conditions, the limitation on the total issuance amount and the reporting to the competent authorities for effective registration of the issuance.

However, the criteria of the financial conditions and the limitation amount applicable to the issuance of corporate bonds by a Taiwan project company can be exempted to certain extent if (1) the Taiwan project company involved in an infrastructure project is a public company and issues non-discretionary corporate bonds (secured and unsecured) for raising funds for the infrastructure project concerned, or (2) the Taiwan project company involved in the urban renewal project is a listed company engaging in real estate investment development business and issues non-discretionary corporate bonds (secured and unsecured) for raising funds for the urban renewal project concerned.



Yi-Jiun Su

Lee and Li, Attorneys-at-Law  
7th Floor, 201, Tun Hua North Road  
Taipei  
Taiwan, R.O.C.

Tel: +886 2 2715 3300 ext. 2394  
Fax: +886 2 2713 3966  
Email: yijiunsu@leeandli.com  
URL: www.leeandli.com

Yi-Jiun Su, a partner at Lee and Li, Attorneys-at-Law, is qualified to practice law in Taiwan and New York. Yi-Jiun specialises in areas of real property, construction and infrastructure, corporate investment, government procurement, and dispute resolution. She has substantial experience in handling conveyancing and international engineering and construction works for a wide range of clients from different jurisdictions. Yi-Jiun has represented investors, developers, equity funds, retailers/wholesalers, hotel/resort operators, contractors, and consortiums in matters involving conveyancing, leasebacks, and public auctions of large real property, government procurement, and investments in and construction of power plants and other infrastructure projects across the world. She has also represented several multinational companies in resolving heated international construction disputes through negotiation, mediation, arbitration and/or litigation.



Lee and Li, Attorneys-at-Law, Taiwan's foremost law firm, has been providing quality legal services for over four decades. Our 22 practice groups consist of more than 650 attorneys and support staff. The quality of our work is recognised locally and internationally - *International Financial Law Review* has selected Lee and Li as the Best Law Firm in Taiwan each year since 2001. This is just one of the many accolades that Lee and Li has received from professional communities.

Among others, our Practice Groups of Real Estate/Construction, Government Contracts, Banking/Finance and Capital Market provide a full range of legal services. We have counseled on many major conveyancing and infrastructure projects such as project financing for power plants, high speed railway and mass rapid transportation systems.

## Current titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Commodities and Trade Law
- Competition Litigation
- Corporate Governance
- Corporate Recovery & Insolvency
- Corporate Tax
- Dominance
- Employment & Labour Law
- Enforcement of Competition Law
- Environment & Climate Change Law
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining
- Oil & Gas Regulation
- Patents
- PFI / PPP Projects
- Pharmaceutical Advertising
- Private Client
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Shipping
- Telecoms, Media & Internet
- Trade Marks



59 Tanner Street, London SE1 3PL, United Kingdom  
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255  
Email: [sales@glgroup.co.uk](mailto:sales@glgroup.co.uk)

[www.iclg.co.uk](http://www.iclg.co.uk)

This article appeared in the 2013 edition of *The International Comparative Legal Guide to: Project Finance*; published by [Global Legal Group Ltd](http://www.iclg.co.uk), London.([www.iclg.co.uk](http://www.iclg.co.uk) )